INTRODUCTION
THE BORDER CROSSED US: CURRENT ISSUES IN IMMIGRANT LABOR

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A group of unionized Latino, Chinese, and Polish workers in a Manhattan garment factory complain to the factory owner about his failure to pay overtime as required by law, and some workers file administrative complaints with the New York Department of Labor. In retaliation, the owner fires the workers who filed complaints. When the union grieves the discharges and the Department of Labor notifies the factory owner of his overtime liability, the owner casts about for another strategy to punish his workers and, hopefully, evade his overtime obligations. Choosing a familiar path, the owner calls the Immigration and Naturalization Service ("INS") to request a raid of his own factory. INS obliges, arresting nearly thirty workers, and declines to fine the factory owner in light of his cooperation on the raid. But this story has an unusual ending: the Immigration Judge hearing the resulting deportation cases dismissed them, on the grounds that the INS had violated its own internal rules restricting worksite raids in the middle of a labor dispute,[1] and the New York Department of Labor successfully prosecuted the factory owner for violating its anti-retaliation statute by calling the INS to punish his workers.[2]

It is well known that many immigrants in this country labor long hours for illegally low pay in perilous working conditions,[3] and also that employers frequently seek to control their non-citizen workers by threatening them with deportation.[4] Although occasionally acknowledged by senior immigration

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1. The facts of the labor dispute, retaliatory tip, raid, and dismissal are set forth in In re: Herrera-Priego, U.S. D.O.J. EOIR (Lamb, I.J., July 10, 2003), at 7–11, 14–17 (terminating proceedings based on INS violation of INS Operations Instruction 287.3a, an agency rule restricting raids during labor disputes), *available at* http://www.lexisnexis.com/practiceareas/immigration/pdfsweb428.pdf. The cases were litigated over several years by students in the NYU Immigrant Rights Clinic, including Hayne Yoon, Marielena Piriz, Anita Sinha, Mina Park, and Benita Jain, together with co-counsel Alison Rosenberg and Muzaffar Chishti of UNITE!.

2. *Id.* at 16.

3. *See, e.g.*, Rivera v. NIBCO, 364 F.3d 1057, 1064 (9th Cir. 2004) ("There are reportedly over 5.3 million [immigrant] workers in the 'unauthorized labor' force . . . Many of these workers are willing to work for substandard wages in our economy's most undesirable jobs.").

4. *Id.* at 1064–65 ("While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they

officials,[5] it is less well known that a substantial amount of INS worksite enforcement correlates with the existence of formal labor disputes, despite internal agency rules intended to limit INS involvement in employer-employee struggles.[6] By implication, an even more substantial amount of worksite raids likely correlate with informal labor disputes, including disputes that have not yet resulted in the filing of administrative or judicial complaints or union grievances. That is, in many instances, and perhaps in a majority of cases, the reason immigration agents[7] receive a tip and conduct a raid is because a retaliating boss (or, perhaps at times, a disgruntled employee) seeks an unlawful edge in labor and employment relations. In practice, INS has frequently allowed itself to be used as a tool of sweatshop bosses unlawfully retaliating against their workers.[8]

Evidence of the deep entanglement of immigration enforcement in labor disputes is revealed in a statistical profile of worksite enforcement in one of the largest INS Districts, New York City.[9] The data set consists of the name and address of the companies that were the subject of an INS raid in a thirty-month period in 1997–99, and for which INS had closed its investigation file by the date the data was released in June 2000. This listing of INS raid sites, 184 in all, was compared to records of labor complaints filed with state and federal labor and employment agencies in New York. The latter were gathered in response to Freedom of Information Act ("FOIA") and Freedom of Information Law ("FOIL") requests seeking information about which of the 184 INS raided companies, if any, were also the subject of a labor charge, petition, complaint, or

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will be subjected to deportation proceedings or criminal prosecution . . . The caselaw substantiates these fears . . . As a result, most undocumented workers are reluctant to report abusive or discriminatory employment practices.").

5. *See, e.g.*, Louis Uchitelle, *INS is Looking the Other Way as Immigrants Fill Jobs*, N.Y. TIMES, Mar. 9, 2000, at C1 (senior INS official acknowledging that in 2000, INS worksite raids were rare "unless the employer turns a worker in, and employers usually do that only to break a union or prevent a strike or that kind of stuff.").

6. *See* INS Operations Instruction 287.3a (Dec. 1996) (restricting INS raids in the midst of a labor dispute), *redesignated as* § 33.14(h) of the INS Special Agent's Field Manual (Apr. 2000), *reprinted in* 74 INTERP. RELEASES 199 (Jan. 20, 1997).

7. On March 1, 2003, the functions of the INS were transferred to the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

8. It is well-settled that it is unlawful for an employer to contact INS in retaliation for its employees' exercise of their labor rights. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) (employer who contacts INS in retaliation for workers' union organizing activities violates National Labor Relations Act); Singh v. Jutla, 214 F. Supp. 2d 1056, 1061 (N.D. Cal. 2002) (employer who contacts INS in retaliation for employee's filing of wage and hour complaint violates Fair Labor Standards Act); Contreras v. Corinthian Vigor Ins. Co., 25 F. Supp. 2d 1053 (N.D. Cal. 1998) (same, as to communications with INS or Social Security Administration).

9. This profile is based on data obtained from a series of Freedom of Information Act ("FOIA") requests, some of which resulted in the disclosure of data only after the INS agreed to settle FOIA litigation. *See* UNITE v. INS, No. 99 Civ. 1884 (S.D.N.Y. Mar. 15, 1999). The suit was litigated on behalf of UNITE by Nina Zuckerman, Nanina Takla, Aramis Rios, and Diana Kasdan, all students in the NYU Immigrant Rights Clinic. *See also* Susan Sachs, *Files Suggest Profiling of Latinos Led to Immigration Raids*, N.Y. TIMES, May 1, 2001, at B1 (reporting on results of same litigation).

other proceeding. The results indicated that 102 of the 184 INS-raided businesses were subject to a labor agency investigation or proceeding. There were 122 instances of a labor investigation or proceeding in all, since some INS-raided businesses were subject to proceedings at more than one agency. Table 1 presents the data on labor investigations and proceedings at INS-raided businesses, by agency.

Table 1
Labor Investigations and Proceedings at INS-Raided Businesses, by Agency

Agency	Number of Labor Investigations and Proceedings at INS-Raided Businesses	Percent (n=122)
US Dept. of Labor[10]	86[11]	70.49
NLRB, Region 2[12]	1[13]	0.82
NLRB, Region 29[14]	10[15]	8.20
NY Dept. of Labor[16]	25[17]	20.49
NY AG Lab. Bureau[18]	0[19]	0.00
TOTALS	122	100.00

10. The U.S. Department of Labor ("US DOL") enforces the federal minimum wage, overtime, and child labor provisions. *See* 29 U.S.C. § 216.

11. Of these 86 US DOL investigations, 33 resulted in a determination of minimum wage or overtime liability, 50 in a US DOL determination of "no violation disclosed," and DOL did not provide the results for three investigations. The total figure, 86, is particularly striking because, during most of the sample period, the US DOL had a formal arrangement with INS whereby DOL agents investigating a wage-and-hour complaint were obligated to examine an employer's payroll records for compliance with the immigration law requirement that only work-authorized immigrants be employed, and to report any irregularities to INS. *Memorandum of Understanding Between INS and Labor Department on Shared Enforcement Responsibilities, reprinted in* DAILY LAB. REP. (BNA) No. 113, at D-1 (June 11, 1992). As a result, advocates tended to discourage immigrants from filing claims with US DOL. Although the agency agreement was modified in late 1998, *Memorandum of Understanding Between the Immigration and Naturalization Service, Department of Justice, and the Employment Standards Administration, Department of Labor*, Nov. 23, 1998, *reprinted in* DAILY LAB. REP. (BNA) No. 227, at E-10 (Nov. 25, 1998), immigrants and their advocates remained suspicious of US DOL and often refrained from filing complaints with the agency.

12. The National Labor Relations Board ("NLRB") enforces the National Labor Relations Act. NLRB Region 2 includes Manhattan, the Bronx, and Westchester and Rockland Counties.

13. Data obtained pursuant to a FOIA request (FOIA response on file with author).

14. NLRB Region 29 includes Brooklyn, Queens, Staten Island, and Nassau and Suffolk Counties.

15. Data obtained pursuant to a FOIA request (FOIA response on file with author).

16. The New York Department of Labor enforces state minimum wage and overtime laws. *See* N.Y. LAB. LAW § 663(2).

17. Data obtained pursuant to a FOIL request (FOIL response on file with author). The response indicated DOL investigations at 24 of the 184 INS sites, but omitted the overtime complaints at H.C. Contracting, Inc., the location of the dispute described *supra* note 1 and one of the 184 INS raids in the sample. Adding this yields a total of 25.

18. The Attorney General's Labor Bureau also enforces minimum wage and overtime laws.

19. Data obtained pursuant to a FOIL request (FOIL response on file with author).

Table 2 presents the data on INS-raided businesses that were subject to labor proceedings as a percentage of the number of total INS-raided businesses.

Table 2
INS-Raided Businesses Subject To Labor Agency Investigation or Proceedings

	Number of INS-Raided Businesses Subject to Labor Agency Investigation or Proceeding	INS-Raided Businesses Subject to Labor Agency Investigation or Proceeding as Percent of Total INS-Raided Businesses (n=184)
Subject to proceeding at *one* labor agency	84	45.65
Subject to proceeding at *two* labor agencies	16	8.70
Subject to proceeding at *three* labor agencies	2	1.09
TOTALS	102	55.44

This data is dramatic evidence of the close relationship between labor disputes and immigration enforcement. Fully *fifty-five percent* of the workplaces raided by INS in the sample were the subject of at least one formal complaint to or investigation by a labor agency. This figure likely understates the actual number of worksites that were in the midst of a labor struggle at the time of the immigration tip or raid, as the calculations do not account for union grievances, litigation, oral and other informal complaints to employers, and complaints to other administrative agencies (such as employment discrimination or workplace safety agencies). Whatever the precise number, it is plain that a very substantial proportion of worksite raids are close in time to, and likely prompted by, a labor dispute.

One implication of the above data, confirming that the INS regularly raids worksites engaged in a labor controversy, is that the Supreme Court may be called upon to revisit its 1984 holding that the exclusionary rule is generally inappropriate for civil deportation proceedings.[20] In *INS v. Lopez-Mendoza*, the Court relied explicitly on the asserted presence of sufficient training, supervision, and internal management procedures to deter abuses by immigration agents conducting raids in concluding that the exclusionary rule was

20. INS v. Lopez-Mendoza, 468 U.S. 1032, 1042 (1984) (applying a "balancing test to the benefits and costs of excluding concededly reliable evidence from a deportation proceeding" and holding that in general no such exclusionary rule need apply).

unnecessary.[21] The majority conceded, however, that "[o]ur conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread."[22] In 1996 INS adopted an internal agency rule restricting raids amidst labor disputes,[23] but the above data strongly suggests that the agency has not implemented the rule in practice—contrary to the *Lopez-Mendoza* majority's premise that agency rules alone adequately deter abusive INS raid practices.[24]

The relationship between immigration enforcement and labor disputes is not surprising, as some employers have long seized upon INS raids as a tool to retaliate against workers and escape liability for labor violations. After all, employers are rarely fined for hiring or employing unauthorized workers or failing to maintain the required paperwork,[25] and so those already willing to flout labor standards may have little incentive not to violate immigration laws as well.[26] Nor is the relationship new, as this country's regulation of labor markets and of borders has long overlapped, from 18th century policies on slavery and indentured servitude to contemporary debates on guestworker programs and a new paradigm for U.S.-Mexico relations.

So what are courts, legislatures, immigrants, and their advocates to do when confronted by apparent contradictions in labor and immigration policies? In *Herrera-Priego*, the retaliatory raid case described above,[27] the Immigration Judge worked to harmonize immigration and labor laws so as to prevent the employer from using deportation threats as a strategy for unlawful labor retaliation. But a year earlier, the United States Supreme Court failed miserably when it faced a similar challenge. In *Hoffman Plastic Compounds, Inc. v.*

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21. *Id.* at 1044–45.

22. *Id.* at 1050.

23. *See* OI 287.3a, *supra* note 6.

24. Recent evidence that INS engages in widespread racial and ethnic profiling in its worksite raid practices further undermines the foundation of *Lopez-Mendoza*. *See* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Law*, 6 U. PA. J. CONST. L. 1081, 1102–11 (2004) (presenting national and local data on INS profiling in worksite raids and airport inspections and arguing data may "compel reconsideration" of *Lopez-Mendoza*).

25. In 2001, the last year for which INS has provided figures, only 113 warnings were issued to employers nationally, 105 notices of intent to fine, and 66 final orders. 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 5, *available at* http://uscis.gov/graphics/shared/aboutus/statistics/ENF2001text.pdf. These figures themselves are calculable only by reference to the same figures published in 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 203; since 1999 INS has published these statistics only as percentage variations from the 1999 numbers.

26. *See* Brief of Amici Curiae Employers and Employer Organizations, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (No. 00-1595), at 14–23, *available at* 2001 WL 1631729 (analyzing economic incentives for outlaw firms to violate immigration laws, particularly if such violation were to immunize firm from ordinary labor law liability). *See also* Robert I. Correales, *Did* Hoffman Plastic Compounds, Inc., *Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103, 139–40 (2003) (discussing economic analysis of employer *amicus* brief in *Hoffman Plastic*).

27. *See supra* note 1 and accompanying text.

NLRB,[28] the Court held that an employer who fired a worker for participating in union organizing activities was immune from ordinary backpay liability under the National Labor Relations Act, where the employer learned only later that the wrongfully discharged employee was also undocumented.[29] The Court rejected arguments that the nation's labor and immigration statutes worked together when they removed incentives for employers to prefer undocumented workers.[30] The *Hoffman Plastic* decision was wrongly decided.[31] It will no doubt cause further exploitation of already-vulnerable immigrant workers, as well as an erosion of the terms and conditions of employment for those who compete with them in the labor market. But *Hoffman Plastic* now forms part of the legal landscape with which workers must contend.

The articles in this volume address many of the urgent issues that arise at the intersection of labor and immigration law, including those prompted by the disastrous *Hoffman Plastic* decision. In her article, Julie Rivchin analyzes the implications of the emerging workers' center model of immigrant organizing for the rights of low-wage immigrant workers. Rivchin argues that workers' centers often offer a different approach to holistic advocacy and grassroots leadership than traditional industrial unions; she also explains the ways in which the framework of labor law creates advantages and disadvantages for organizing outside of traditional labor unions. Finally, Rivchin offers a comprehensive assessment of legal and strategic considerations relevant to organizing within the workers' center structure or in collaboration with labor unions.

Keith Cunningham-Parmeter illustrates the ways that the administrative state has failed to protect farmworkers' health and safety and aptly develops a theory of how tort litigation could improve field protections and compensate victims of pesticide-related injuries. The article recognizes the limits of the tort system but highlights the potential for relief for at least those workers whose injuries occur soon after an exposure event. The article further argues that this approach is useful to pursue because, over time, successful tort claims may lay the groundwork for actions related to chronic injuries that result from long-term pesticide exposure. Increased tort liability will create incentives for growers and chemical manufacturers to establish improved protections for farmworkers.

Laura Lockard develops a theory for how farmworkers can bring private actions against growers for health and safety violations under the Agricultural

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28. 535 U.S. 137 (2002).

29. *Id.*

30. *Id.* Justice Kennedy provided the key fifth vote in the *Hoffman Plastic* majority, which was a particular disappointment in light of his previous recognition of the need to harmonize labor and immigration laws. *See* NLRB v. Apollo Tire Co., 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring) ("If the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices . . . .").

31. *See, e.g.*, Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. (forthcoming 2004).

Worker Protection Act ("AWPA"). Lockard's innovative theory focuses mainly on AWPA's prohibition against employer violations of the terms of any "working arrangement" made with a farmworker. In her article, Lockard illustrates that farmworkers can use AWPA's working arrangement provision to enforce health and safety standards designed to protect farmworkers through private rights of action against their employers. Lockard shows that this reading of AWPA's working arrangement is consistent with Congressional intent, judicial decisions interpreting AWPA, and is desirable from a policy perspective.

Professor Beth Lyon offers an insightful comment on the recent decision of the Inter-American Court of Human Rights and its consequences for immigrant workers in the Americas. Widely seen as a response to the U.S. Supreme Court's decision in *Hoffman Plastic*, the Inter-American Court's Advisory Opinion 18 provides an articulation of human rights norms and international legal principles applicable to immigrant workers. Lyon considers the context of the decision and the arguments addressed by the court; she concludes that *OC-18* marks an incremental yet progressive development in rights for migrant workers under international law.

In a report authored by Rebecca Smith, Amy Sugimori, and Luna Yasui, the National Employment Law Project ("NELP") provides a survey of recent developments in immigration enforcement and labor protection under state law. The NELP authors discuss the impact of the *Hoffman Plastic* decision on a broad range of worker protection remedies and immigrant access to social services. The report offers guidance to law enforcement, local agencies, and worker advocates in order to ensure protections for immigrant workers in the post-*Hoffman* context. Smith, Sugimori, and Yasui also highlight relevant local legislative campaigns and advocate further policy reforms.

These are difficult times for all workers, especially for non-citizen workers. The participants in this colloquium examine a number of doctrinal and policy questions that result from the tensions between, on the one hand, an immigration statute that makes work unlawful, and on the other, a labor and employment framework that endorses universal rights regardless of a worker's immigration status, and that depends on public complaint and private enforcement by all workers to deter employer abuse. In the absence of federal leadership, which to date has been more characterized by empty promises than concrete deeds,[32] these articles offer specific, ameliorative proposals. One can only hope that the failed *Hoffman Plastic* vision of hollowed-out labor standards for non-citizens will soon give way to one more closely resembling the *Herrera-Priego* model[33] of effective labor rights and tempered immigration enforcement.

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32. *See, e.g.*, President George W. Bush, New Temporary Worker Program: Remarks on Immigration Policy (Jan. 7, 2004) (transcript available at http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html).

33. *See supra* note 1 and accompanying text.